Flexi Homes Sdn Bhd v Atea Environmental Technology (M) Sdn Bhd

HIGH COURT (GEORGETOWN) — CIVIL SUIT NO 22NCVC-58–04 OF 2014
LIM CHONG FONG JC
29 JUNE 2016

Contract — Formation — Concluded contract — Plaintiff agreed to supply and install carpets for defendant's renovation project — Defendant issued purchase order — Plaintiff endorsed on purchase order — Refusal to accept delivery by defendant — Whether there was concluded contract — Whether defendant in breach of contract for refusal to accept delivery of carpets — Whether plaintiff entitled to claim damages for non-acceptance of carpets by defendant — Contracts Act 1950 s 2(a) & (b) — Sale of Goods Act 1957 ss 44 & 56

The plaintiff, vide a revised purchase order ('the said purchase order') issued by the defendant had agreed to supply and install a Toli carpets for the defendant's renovation project for a company known as Intel Technology Sdn Bhd ('Intel Technology'). The plaintiff had endorsed on the said purchase order on 23 May 2012 and went on with the purchase of the Toli carpets with Weng Bee Trading Pte Ltd ('Wee Bee'), the regional importer and distributor of Toli Corp. Problem arose when Intel Technology issued a change order to the defendant to omit the supply and installation of Toli carpets from its contract with the defendant. Consequently, the defendant refused to take delivery of the Toli carpets and did not make any payment to the plaintiff. The plaintiff therefore claimed for damages for the costs of supply of the carpets, the transportation costs and also the warehouse storage costs together with interests. In defence, the defendant submitted that there was no concluded contract for the supply and installation of the carpets because the parties were still negotiating on the contract. The defendant also put the plaintiff to strict proof of its damages. In its submission, the plaintiff relied on the evidence of their sales manager ('PW1'), contracts manager ('PW2') and managing director ('PW3') whereas the defendant relied on the evidence of its general manager ('DW1').

Held:

(1) Normally, the purchase order is treated as the acceptance of the offer that is made in a quotation (s 2(a) and (b) of the Contracts Act 1950). However and since there was no evidence of a prior quotation that was sent to the defendant by the plaintiff, the said purchase order was instead the offer made by the defendant to the plaintiff. The plaintiff had endorsed and accepted the said purchase order on 23 May 2012. On the

facts, there was no directive by the defendant to the plaintiff that the placement of the order for the carpets was to be withheld. Further, the defendant did not also protest on the plaintiff endorsement on the said purchase order. Thus, based on the accepted revised purchase order and conduct of the parties, there was concluded and binding contract between the plaintiff and the defendant (see paras 37, 39 & 41–42).

(2) Since the defendant neither accepted the delivery of the carpets nor paid the price, the defendant was therefore in breach of the contract. Consequently, the defendant was liable to pay damages for non-acceptance of the carpets pursuant ss 44 and 56 of the Sale of Goods Act 1957. The plaintiff's claim for costs of the Toli carpets was proven through the testimony of PW1 and PW3 as well as production of the tax invoices and payment receipts of Wee Bee. The plaintiff had also sufficiently proved the transportation costs through the testimony of PW3 and the production of the invoices of Asia Link Logistics Sdn Bhd and the plaintiff's payment vouchers. The warehouse storage costs was proven through the testimony of PW3 and the production of the tenancy agreement between plaintiff and one Teoh Gaik Lai and the plaintiff's payment vouchers (see paras 44–47).

[Bahasa Malaysia summary

Plaintif, melalui pesanan belian yang disemak semula ('pesanan belian tersebut') yang dikeluarkan oleh defendan telah bersetuju untuk memasang karpet Toli untuk projek pengubahsuaian defendan bagi syarikat yang dikenali sebagai Intel Technology Sdn Bhd ('Intel Technology'). Plaintif telah mengendors pesanan belian tersebut pada 23 Mei 2012 dan terus dengan pembelian karpet Toli dengan Weng Bee Trading Pte Ltd pengimport dan pengedar daerah Toli Corp. Masalah berbangkit apabila Intel Technology mengeluarkan perintah pertukaran kepada defendan untuk tidak memasukkan bekalan dan pemasangan karpet Toli daripada kontraknya dengan defendan. Akibatnya, defendan enggan menerima penghantaran karpet Toli dan tidak membuat apa-apa bayaran kepada plaintif. Plaintif oleh itu menuntut untuk ganti rugi bagi kos bekalan karpet, kos pengangkutan dan juga kos penyimpanan gudang bersama dengan faedah. Dalam pembelaan, defendan berhujah bahawa tidak terdapat kontrak yang selesai bagi bekalan dan pemasangan karpet kerana pihak-pihak masih berunding mengenai kontrak. Defendan juga menyebabkan plaintif kepada pembuktian ketat terhadap ganti ruginya. Dalam penghujahannya, plaintif bergantung ke atas keterangan mengenai pengurus jualan mereka ('PW1'), pengurus kontrak ('PW2') dan pengarah urusan ('PW3') sementara defendan bergantung ke atas keterangan pengurus besarnya ('DW1').

Diputuskan:

(1) Biasanya, pesanan belian dianggap sebagai penerimaan tawaran yang

dibuat dalam sebut harga (s 2(a) dan (b) Akta Kontrak 1950). Walau bagaimanapun dan memandangkan tidak terdapat keterangan sebelum sebut harga yang dihantar kepada defendan oleh plaintif, pesanan belian adalah sebaliknya tawaran yang dibuat oleh defendan kepada plaintif. Plaintif telah mengendors dan menerima pesanan belian tersebut pada 23 Mei 2012. Atas fakta, tidak terdapat arahan oleh defendan kepada plaintif bahawa peletakan pesanan bagi karpet adalah ditahan. Selanjutnya, defendan juga tidak membantah ke atas pengendorsan plaintif ke atas pesanan belian tersebut. Oleh itu, berdasarkan penerimaan pesanan belian yang disemak semula dan tindakan pihak-pihak, terdapat kontrak yang telah selesai dan mengikat di antara plaintif dan defendan (lihat perenggan 37, 39 & 41–42).

(2) Memandangkan defendan tidak menerima penghantaran karpet ataupun membayar harga, defendan oleh itu melanggar kontrak. Akibatnya, defendan adalah bertanggungjawab untuk membayar ganti rugi bagi ketidakterimaan karpet berikutan ss 44 dan 56 Akta Jualan Barangan 1957. Tuntutan plaintif untuk kos karpet Toli dibuktikan melalui keterangan PW1 dan PW3 dan juga pengemukaan invois cukai dan resit pembayaran Wee Bee. Plaintif juga secara mencukupi membuktikan kos pengangkutan melalui keterangan PW3 dan pengemukaan invois Asia Link Logistics Sdn Bhd dan baucar bayaran plaintif. Kos penyimpangan gudang dibuktikan melalui keterangan PW3 dan pengemukaan perjanjian penyewaan di antara plaintif dan seorang Teoh Gaik Lai dan baucar bayaran plaintif (lihat perenggan 44–47).]

Notes

For cases on concluded contract, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 5069–5091.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)

Lim Pang Cheong lwn Tan Sri Dato' Dr Rozali Ismail & Yang Lain [2010] MLJU 1760; [2011] 7 CLJ 645, HC (refd)

National Panasonic (Malaysia) Sdn Bhd v Lem Teh Sem @ Lim Teck Seng & Anor [2003] MLJU 423; [2003] 8 CLJ 408, HC (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd [2015] 3 MLJ 753; [2015] 3 CLJ 291, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLJ 478; [2014] 6 CLJ 285, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(a), (b), 74
Electronic Commerce Act 2006 ss 2(1), 5, 6, 8
Evidence Act 1950 s 90A
Sale of Goods Act 1957 ss 31, 44, 56

Jei Sooria VP (Tan Lee Kiat with him) (Othman Hashim & Co) for the plaintiff.
Rajdev Singh (Yeap Siew Fen with him) (Wong-Chooi & Mohd Nor) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a construction supply and installation contract case of carpets for the renovation of a multinational factory in Penang.

[2] The plaintiff is a private registered company involved in the business of sale, supply and installation of ceiling and flooring products.

[3] The defendant is also a private registered company involved in general contracting works.

[4] The dispute herein pertains to the defendant's failure to pay the plaintiff for the carpets ordered by the plaintiff for the renovation of the Intel PG6/7 building conversion project ('project') undertaken by the defendant for Intel Technology Sdn Bhd ('Intel Technology').

PRELIMINARY

[5] The trial of this action took four days on 28 and 29 September 2015 and then on 30 and 31 March 2016. The first tranche of the trial was heard by Justice Nordin bin Hasan JC and upon His Lordship's transfer to the Kuala Lumpur High Court, I took over and completed the hearing of the second tranche.

[6] The trial documents were marked as Bundles A–K comprising also of the documentary evidence in Bundles B, C, D, E, J and K. During the course

of the first tranche of the trial, exhs P1–D54 that are found in Bundles B, C, D and E were individually admitted in evidence. However during the second tranche of the trial before me, all the documentary evidence adduced in Bundles B, C, D, E, J and K are classified in category B by the consent of the parties. Thus, individual admission of them individually as exhibits has been dispensed.

[7] The following witnesses testified for the plaintiff and the defendant respectively:

(a) Lee Eng Joo ('PW1'), the Sales Manager of Weng Bee Pte Ltd;

(b) Aainaa Zulkiflie ('PW2'), formerly the contracts manager of the plaintiff;

(c) Stephanie Wong Mooi Heong ('PW3'), the managing director of the plaintiff; and

(d) Anthony Lai ('DW1'), the general manager of the defendant.

[8] After the close of the trial, the parties simultaneously filed and exchanged their written submissions in chief and in reply as directed. Oral clarifications were held with counsel on 20 May 2016 and 15 June 2016.

BACKGROUND FACTS

[9] In early 2012, the defendant invited the plaintiff to discuss on the on the supply and installation of Toli carpets for the project then being undertaken by the defendant. The plaintiff has on 28 February 2012 vide email informed the defendant of the required lead time of three months to deliver the Toli carpets as it has to be on indent basis. The defendant has to however complete the installation of the carpets based on the time frame required by Intel Technology. For this purpose, the defendant on 20 March 2012 forwarded the project work schedule to the plaintiff vide email which showed that the carpets installation to commence on 5 June 2012 and to complete on 4 July 2012.

[10] Since the plaintiff was apprised of the stipulated time requirement of Intel Technology, the plaintiff required a firm commitment from the defendant by way of a purchase order.

[11] On 2 May 2012, the defendant sent to the plaintiff its purchase order No PO#M40.8252/C17206 that is exhibited in Bundle B pp 21–22 ('purchase order') requesting the plaintiff to supply and install Toli carpets at the project at the contract sum of RM1,294,890.22. In the purchase order, the following terms are, inter alia, stated therein:

Delivery date: Follow schedule

Delay charges: In case vendor fails to meet the above indicated delivery date an amount of 1% of order value __ per day/week of delay up to a maximum of 10% of the PO value will be deducted from the payments to the Vendor.

[12] Then on 6 May 2012 after the defendant having finalised the choice of the carpets selection with Intel Technology communicated the same to the plaintiff. As the result, the contract sum in the purchase order was revised to RM1,313,962.82 and the defendant issued a revised purchase order to the plaintiff with handwritten amendments scribbled thereon that is exhibited in Bundle C pp 1–2 ('revised purchase order').

[13] As the result, the defendant on 11 May 2012 sent to the plaintiff the revised project work schedule which showed that the carpets installation to commence on 16 June 2012 and to complete on 30 July 2012.

[14] Thereafter on 14 May 2012, the plaintiff vide email submitted to the defendant the submittal forms of the choice of carpets selected and the defendant confirmed on the same day vide return email. On 16 May 2012, the plaintiff also vide the email of PW3 notified the defendant that the plaintiff was still awaiting the deposit from the defendant. The revised purchase order was still on KIV without any deposit payment made. The plaintiff reminded the defendant that the lead time for the carpets manufacturer's production and delivery is three months.

[15] There was subsequently a meeting held on 17 May 2012 wherein the plaintiff informed the defendant that due to the aforesaid revised purchase order, the Japanese manufacturer could only review the defendant's intended purchase order on 14 May 2012 by reason that the summer holidays in Japan was from 28 April 2012–13 May 2012. Furthermore, the plaintiff notified the defendant that the arrival of the first shipment and second shipment of the Toli carpets in Penang would only be on 17 July 2012 and 14 August 2012 respectively.

[16] According to the plaintiff, the defendant thereafter on 17 May 2012 at 2.45pm vide SMS of its project manager Eric Tan instructed the plaintiff to proceed with the revised purchase order. Hence on 18 May 2012, the plaintiff sent to the defendant its revised quotation for the carpets at the contract sum of RM1,313,962.82 and an invoice of RM517,956.10 being 50% of the claim for the supply of carpets.

[17] On 21 May 2012, the defendant vide the email of DW1 informed the plaintiff that the defendant would pay 50% of the down payment for the

carpets first by this week and requested the plaintiff to send the original invoice to the defendant's Penang office. The plaintiff accordingly sent its original invoice to the defendant.

[18] There were also tri-partite meetings held on 21–22 May 2012 amongst the plaintiff, defendant and Intel Technology to clarify the carpets manufacturing process. The defendant informed Intel Technology that the delivery of the carpets is delayed because the supplier could not meet the completed dates and the new delivery date is 24 July 2012 instead of 22 June 2012. The defendant was requested to meet up with Toli Corp to work out solutions. The defendant was also requested by Intel Technology to provide three options to Intel Technology on change of carpets.

[19] Consequent to the aforesaid defendant's SMS and email of 17 May 2012 and 21 May 2012, the plaintiff on 23 May 2012 endorsed on the revised purchase order and went ahead with the purchase of the Toli carpets with Weng Bee Trading Pte Ltd, the regional importer and distributor of Toli Corp.

[20] Pursuant to the aforesaid tri-partite meetings, the plaintiff on 25 May 2012 forwarded to the defendant on the proposed three options including cancellation costs of 20% if the Toli carpets was changed. The defendant accordingly reverted to Intel Technology vide email on the same day. The defendant subsequently had a meeting with Intel Technology to discuss the matter further.

[21] On 29 May 2012, the plaintiff sent to the defendant vide email and letter the technical data analysis of comparison between Toli and Interface brands of carpets as further requested by Intel Technology.

[22] Then on 4 June 2012, the defendant vide email requested the plaintiff to urgently furnish the target delivery dates of the carpets and the plaintiff responded to the defendant on the same day with the email response from Toli Corp — Overseas Division.

[23] At the request of the defendant, the plaintiff vide email on 8 June 2012 furnished the plaintiff's proposed cancellation costs claim if the supply of the Toli carpets is cancelled.

[24] The defendant vide email replied on 13 June 2012 as follows:

> With regards to attached document provided for reference on the cancellation charges of the carpets, please provide further explanation/details of the items quoted. The purpose is to support the cancellation fee with sound justifications. Besides that, do also note that Intel may eventually ask for further details on this matter and the details requested will need to be made available at short notice.

I also understand that in one of the earlier emails, the PO is put under KIV by Flexihomes as deposit payment have not been made. As of my understanding, no deposit payment have been made to Flexihomes on the carpets to-date.

[25] The plaintiff responded to the defendant as follows vide email on 17 June 2012:

Reference is made to your email dated 8th June 2012, we write to inform you that our P.O. to Toli Corporation have been issued on the same date upon receiving your P.O. on 3rd May 2012. Subsequent to the confirmation on the final selection of the carpets, Toli have proceeded with the fabrication of the carpets in order to meet the tight project completion schedule.

As we have accepted the P.O. you have issued to us on 3rd May 2012 at this stage we are UNABLE TO ACCEPT any cancellation of the carpets mentioned in your email.

Further, we also wish to inform you that we have not in any way KIV the P.O. even though no deposit payment have been made as we have already placed Order with Toli Corporation and our keen determination to complete the project. Our attached Latest Updated Events and Latest Update Payments Outline clearly indicates that we are progressing with the carpets works as per schedule.

Shall you need anything further please feel free to contact me. Thanks.

[26] The defendant replied to the plaintiff vide email on 26 June 2012 as follows:

... With regards to your comments dated 17 June, based on the documents that I have, I am afraid that we may have at this moment differing views on this. Nevertheless, I suggest that we concentrate on our submission first to Intel. I am sure we could in the end settle our differences (if any) amicably.

[27] Subsequently the plaintiff vide email on 12 July 2012 notified the defendant that the first carpets delivery ETA Singapore 5 July 2012 is already at the warehouse and the second shipment ETA Singapore is on 12 July 2012. The defendant responded vide email to discuss the matter further over a meeting on 17 July 2012.

[28] After the meeting, the defendant on 27 July 2012 vide email wrote to the plaintiff as follows:

Following the discussion at your office on 17 July 2012, you have indicated that Flexihomes can send to us a copy of the email correspondences between Flexihomes and Intel supporting the chronology of events provided by Flexihomes (as the ones forwarded earlier were files that contain no details) so that we can consider whether to pursue further with Intel with regard to the carpet descoping. Could you forward the emails please so that we can study this matter again. Thanks.

[29] Subsequently there was another meeting held on 10 August 2012 between the plaintiff and the defendant wherein the plaintiff notified the defendant that the carpets have arrived in Penang and were stored at 41 Jalan Perusahaan Jelutong 3, 11600 Penang at a monthly rental of RM3,300/month. The defendant further requested the plaintiff to assist in the disposal of the carpets by utilising them in the defendant's other projects.

[30] In the meanwhile, Intel Technology has issued a change order to the defendant to omit the supply and installation of Toli carpets from its contract with the defendant and re-awarded the contract for the supply and installation of Interface carpets to another contractor. The defendant thereafter also refused to take delivery of the Toli carpets and did not make any payment to the plaintiff.

[31] As the result, the plaintiff brought this action on 23 April 2014.

CONTENTIONS OF THE PARTIES

[32] The plaintiff's cause of action here is for breach of contract on the part of the defendant and is consequently suing the defendant for damages for non acceptance of goods. In this respect, the plaintiff claimed SGD363,982.66 for the costs of supply of the carpets, RM100,953.60 and RM64,013.60 for freight charges and RM3,300/month for storage of the carpets together with interests and costs.

[33] In defence, the defendant in gist contended that there was no concluded contract for the supply and installation of the carpets because the parties were still negotiating on the contract. At that material time too, the plaintiff knew that Intel Technology wanted to change the carpets from Toli carpets to Interface carpets by reason of the defendant's inability to ensure that the delivery of the Toli carpets met the time requirement of Intel Technology. Finally, the defendant put the plaintiff to strict proof of its damages as claimed.

FINDINGS OF THE COURT

[34] The primary issues for determination are thus typical of that in a contractual dispute, to wit: whether there was a concluded contract followed by whether there was a breach and finally followed by the resultant loss and damage inflicted. I propose to deal with each of them seriatim.

Before so embarking, there is before me substantial documentary evidence that captured the communications between the parties supplemented by oral testimonies of witnesses of both sides. I have reviewed all that are relevant to determine the issues and I have in the event of conflict preferred the documentary evidence over that orally testified. I find support in this approach

in the judgment of Lee Hun Hoe CJ (Borneo) in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity*. It may be advantageous at this stage to recall the words of Lord Greene MR in *Yuill v Yuill* [1945] P 15 at pp 19–20:
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> > We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an infavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value. (Emphasis added.)

[35] Bearing this principle is mind and as to the first issue, it seems to me that an analysis has to be undertaken along the traditional lines of offer and acceptance. It should suffice for me to refer to two Supreme/Federal Court cases for guidance.

The first is that of *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 wherein Edgar Joseph Jr SCJ said as follows:

> ... the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement, the parties must be ad idem, ie there must be a consensus between them. But bearing in mind the familiar saying that a person's

belief or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may be existence of an agreement be inferred? *The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract* ... (Emphasis added.)

The other is *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 wherein Gopal Sri Ram JCA (later FCJ) said as follows:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER Rep 494, where he said:
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> > *Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the Court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.*
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> This principle applies not only to documents drafted by laymen but also to those prepared by lawyers (see *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* [1973] 129 CLR 99. (Emphasis added.)

[36] As I see it, the parties commenced negotiations on the contract in February 2012. In law of contract parlance, there was the invitation to treat by the defendant to the plaintiff. Quite obviously, they discussed on the quantity and specification of the carpets, delivery and installation dates and the price. As for the delivery and installation dates, the plaintiff made it clear that it required a three months lead time for manufacture and delivery of the carpets. On the other hand, the defendant wanted the plaintiff to warrant compliance with the project work programme that required delivery by 5 June 2012. It was therefore essential that the defendant issued its purchase order to the plaintiff by 5 March 2012 but this was not done.

[37] I find that by reason of Intel Technology's inability to decide on the choice of the carpets until late April 2012, the defendant only issued its purchase order to the plaintiff on 2 May 2012. Normally, the purchase order is treated as the acceptance of the offer that is made in a quotation; see s 2(a) and 2(b) of the Contracts Act 1950. However and since there is no evidence of a prior quotation that was sent to the defendant by the plaintiff, the purchase order was instead the offer made by defendant to the plaintiff. This is also self evident in the purchase order where the plaintiff is required to endorse it to

signify the plaintiff's confirmation and acceptance of the purchase order.

[38] The plaintiff did not forthwith endorse on the purchase order. I find that this was because the plaintiff knew that it could no longer comply with the time requirement of Intel Technology then. In any event, I also find that this time requirement wasn't clearly expressed in the purchase order. There was a mere reference to 'Follow Schedule' but that is uncertain because no schedule was appended to the purchase order. The project work programme that was furnished on 20 March 2012 is to my mind logically no longer relevant as it would have been outdated by then based on the actual ongoing project site activities at that time. There was no evidence adduced that it was otherwise. Furthermore, this is supported by the fact that a revised project work schedule was issued to the plaintiff on 11 May 2012.

[39] I further find by reason of Intel Technology's subsequent change of its choice of the carpet for the LS Office (ex-Relax and Games Room) for the project, the defendant issued the revised purchase order to the plaintiff around 6 May 2012. Again the plaintiff did not forthwith endorse on the revised purchase order.

[40] It is undisputed that the plaintiff on 17 May 2012 informed the defendant that the delivery of the carpets pursuant to the revised purchase order would be in two shipments only on 17 July 2012 and 14 August 2012 respectively. Thus I find that in view of the criticality so as not to cause further slippage to the project schedule at that point in time, the defendant by its project manager's SMS dated 17 May 2012 and general manager's email dated 21 May 2012 directed the plaintiff to proceed with the revised purchase order. The latter is plain from the following testimony of DW1:

Q:	Ok. So do you agree then, there was an agreement for 50% deposit, pursuant to your email? They have requested and you have agreed. So there's an agreement. True?
A:	I verbally agree during that time.
Q:	Not verbally. This through your email dated 21.5.2012, Mr Lai?
A:	Yes.
Q:	Look at page 54. I wouldn't call that 'verbally'.
A:	I agree.

I am mindful there is a secondary issue on the admissibility of the former in evidence, ie the aforesaid SMS of Eric Tan, the defendant's project manager. In this regard, I noted that the plaintiff has through PW3 tendered a certificate pursuant to s 90A of the Evidence Act 1950. Hence and also by reason of the cases of *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006]

3 CLJ 269, *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 and *Lim Pang Cheong lwn Tan Sri Dato' Dr Rozali Ismail & Yang Lain* [2010] MLJU 1760; [2011] 7 CLJ 645 as well as ss 2(1), 5, 6 and 8 of the Electronic Commerce Act 2006 as interpreted in *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478; [2014] 6 CLJ 285, I hereby rule that the aforesaid SMS is admissible in evidence.

[41] Consequently, I find that by the plaintiff's endorsement on the revised purchase order on 23 May 2012, the contract was concluded. In other words, the revised offer of the defendant was accepted by the plaintiff. In so finding, I am aware that there was a tri-partite meeting held on 22 May 2012 that there was the possibility of Intel Technology further changing its decision on the carpets. However what is pertinent is that there was no directive by the defendant or Intel Technology to the plaintiff that the placement of the order for the Toli carpets is to be withheld. In addition, the defendant did not also protest on the plaintiff's endorsement on the revised purchase order the following day on 23 May 2016 as seen from the following testimony of PW3:

> Q: Ms Stephanie, during cross examination, you have testified that you have faxed the acknowledged revised PO at page 1 of Bundle C to the Defendant on 23rd of May. So, my question to you, did the Defendant object to the revised PO that you faxed to them?
>
> A: No.

The conduct of the parties herein is relevant if not also pertinent as seen in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 wherein Gopal Sri Ram JCA (later FCJ) held as follows:

> *Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence* The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v Alt* (1878) 8 Ch D 286 at p 314:
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> > *If a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.*
>
> In *MAA Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170; [1984] 1 LNS 144, George J (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid monies to him. Of the defendant's silence that learned judge said:
>
> > Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had

> expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the height of inequity. (Emphasis added.)

I am aware that there is also the secondary issue advanced by the defendant that it had believed and treated that the plaintiff had KIV or suspended the acceptance of the revised purchase order at the material time. From my review of the chronology of events that have taken place, I find and hold that the plaintiff had only done so between 6 May 2012 and 23 May 2012 when the parties were discussing to resolve the issue of the dates of delivery of the carpets. The applicable agreed dates of delivery were those discussed between the plaintiff and the defendant at the meeting of 17 May 2012. In this connection, I also find that although Intel Technology was concerned about those agreed dates at the meeting held on 22 May 2012, Intel Technology however did not reject those dates. Thus the aforesaid agreed dates of delivery were still maintained when the plaintiff accepted the revised purchase order. The agreed dates were acquiesced by the defendant; otherwise the defendant would have rejected the plaintiff's acceptance. Although the contract was concluded, the plaintiff was nonetheless up to 8 June 2012 still prepared to accommodate the cancellation of the order provided cancellation costs is paid by the defendant. The defendant however did not do so at that point in time.

[42] In the premises, I find and hold that there is a concluded and binding contract between the plaintiff and the defendant for the supply and installation of the Toli carpets at the contract sum of RM1,313,926.82 based on the accepted revised purchase order and conduct of the parties.

[43] The next issue is whether there was a breach of contract on the part of the defendant. It is plain to me that since the defendant did not cancel the order, the defendant is consequently bound to accept the delivery of the carpets and pay for the price. Although this is a supply of goods and services contract, the principles relating to the sale of goods to my mind still apply to the supply portion of the contract. In this regard, s 31 of the Sale of Goods Act 1957 provides as follows:

> 31 Duties of seller and buyer
>
> It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale.

See also *National Panasonic (Malaysia) Sdn Bhd v Lem Teh Sem @ Lim Teck Seng & Anor* [2003] MLJU 423; [2003] 8 CLJ 408.

[44] The Toli carpets arrived in Penang around late July 2012. Since the defendant neither accepted the delivery of the carpets nor paid the price, I find and hold that the defendant is hence in breach of contract.

[45] Consequently, the defendant is liable to pay damages for non-acceptance of the carpets. Sections 44 and 56 of the Sale of Goods Act 1957 provide as follows:

> 44 Liability of buyer for neglecting or refusing delivery of goods
>
> When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not, within a reasonable time after such request, take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:
>
> Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.
>
> 56 Damages for non-acceptance
>
> Where the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance.

See also *Scandinavian Bunkering (Singapore) Pte Ltd v MISC Bhd* [2015] 3 MLJ 753; [2015] 3 CLJ 291 where it was held that the principles in s 74 of the Contracts Act 1950 shall accordingly apply.

[46] The plaintiff has pursued its claim for damages under three heads. Firstly there is the claim for the costs of the Toli carpets for SGD364,042.30 comprising of the deposit payment of SGD155,747.29, first shipment payment of SGD74,024.88 and the second shipment payment of SGD134,270.14. I am satisfied that the plaintiff has adequately proved its claim as required in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 through the testimony of PW1 and PW3 as well as the production of the tax invoices and payment receipts of Weng Bee Trading Pte Ltd. I am mindful that the defendant has raised the issue of the veracity of the plaintiff's deposit payment to Weng Bee Trading Pte Ltd at the trial because it was allegedly paid before the plaintiff endorsed on the revised purchase order. I am nonetheless convinced that the plaintiff has so paid and this is in any event proven by the arrival of the carpets in Penang.

Secondly, the plaintiff claimed for the transportation costs of the carpets from Singapore to Penang amounting to RM164,967.20 comprising of RM100,953.60 for the first shipment and RM64,013.60 for the second shipment. I am also satisfied that the plaintiff has sufficiently proved the costs through the testimony of PW3 and the production of the invoices of Asia Link Logistics Sdn Bhd and the plaintiff's payment vouchers.

Finally the plaintiff claimed warehouse storage costs of the carpets of RM3,300/month and I am satisfied that the plaintiff has also adequately proved it through the testimony of PW3 and the production of the tenancy agreement between the plaintiff and Teoh Gaik Lai and the plaintiff's payment

vouchers. For this head of claim, I further satisfied that the plaintiff had mitigated its loss by having made numerous attempts and efforts including asking the defendant to contact potential buyers to buy the Toli carpets. However the plaintiff was unable to resell the carpets due to the specific carpet design bearing Intel's colour as well as the huge quantity involved.

[47] In the premises and upon my assessment, I find and hold that the damages payable are those above as claimed by the plaintiff.

CONCLUSION

[48] This is an unfortunate situation whereby the defendant did not administer its head contract with Intel Technology and its sub contract with the plaintiff properly together. It is apparent that the defendant went over backwards to accommodate Intel Technology whilst leaving the plaintiff in the lurch despite that the late procurement and hence delivery beyond the original project schedule was attributed to Intel Technology's late decision on the selection of the carpets. In the circumstances, the defendant ought not to have issued the purchase order, otherwise to cancel its revised purchase order with the plaintiff timeously when Intel Technology was not willing to accommodate the late delivery and claim the resultant costs thereby incurred from Intel Technology.

[49] Be that as it may, the mistake has been committed. For the foregoing reasons, I therefore enter judgment for the plaintiff in the following terms:

(i) the defendant shall pay the sum of SGD364,042.30 for the costs of the supply of the carpets;

(ii) the defendant shall further pay the sum of RM164,967.20 for the costs of freight of the carpets;

(iii) the defendant shall also pay the sum of RM3,300 per month for the warehouse storage costs from 1 August 2012 to the date hereof and the defendant is at liberty to collect the carpets from the warehouse within one month from the date hereof, failing which the plaintiff is at liberty to dispose the carpets as the plaintiff deems fit;

(iv) the defendant shall pay interests on (i), (ii) and (iii) above at 5%pa from 23 April 2014 until full realisation; and

(v) the defendant shall pay costs of RM30,000.

Order accordingly.

Reported by Dzulqarnain Ab Fatar